No. 42840-7-II

COURT OF APPEALS,
DIVISION TWO
OF THE STATE OF WASHINGTON

JOSHUA L. FAW,
a single person,

Appellant,

v.

KYLE S. PARKER, individually; and KYLE S. PARKER and "JANE DOE" PARKER, husband and wife, and the marital community composed thereof; and TARA MILLAM, individually; and TARA MILLAM and "JOHN DOE" MILLAM, wife and husband, and the marital community composed thereof,

Respondents.

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

Appellant is Joshua L. Faw, a single person.

This appeal concerns a very serious traffic accident caused by the recklessness of the defendant, Kyle S. Parker. Mr. Parker was found guilty of vehicular assault as a result of his role in causing the accident.[1] This appeal concerns the trial court's dismissal of the defendants, Tara Millam and Jeffrey L. Millam, wife and husband, at summary judgment.[2] The case has a somewhat convoluted factual and legal background, which requires this court to analyze choice of law issues between Oklahoma and Washington.

In the *Second Amended Complaint for Personal Injury and Tort*[3], Mr. Faw alleged two causes of action against the Defendants Millam. Negligence, as a result of the Millams being the record owner of the vehicle which Mr. Parker was driving, and Negligent Entrustment, which does not depend upon establishment of the legal title owner.[4]

The trial court stated that she found no evidence on the record before her that anyone other than Kyle Parker owned the vehicle he was driving at the time of the accident.[5] This conclusion is contrary to applicable law and

[1] CP 59-79.
[2] CP 416-418.
[3] CP 262-266.
[4] CP 264-265.
[5] VRP 25, lines 17-20.

the facts of this case.

Mr. Faw contends that there was an issue of material fact as to the ownership of the vehicle and the trial court erred by dismissing the negligence claim.

Mr. Faw further contended at the summary judgment hearing that the purported documentary evidence that the Millams did not own the vehicle at the time of the accident (a copy of a purported bill of sale) is inadmissible pursuant to ER 1002.[6] Additionally, Mr. Faw argued that the evidence, even if properly admitted, did not sufficiently rebut the presumption of ownership which would, at a minimum, apply under either Oklahoma or Washington law, to allow the trial court to resolve this factual dispute at summary judgment.[7] In order to overcome such a presumption, the defendants would have had to establish by "clear, cogent and convincing" evidence that the presumption had been overcome.[8] Mr. Faw introduced evidence to refute the Millams' contentions. The issue of the Millams' potential liability as a result of Tara Millam being the title holder on the Certificate of Title is a jury question.

Mr. Faw further alleged that the Millams, specifically Tara Millam,

[6] CP 339, lines 5-11; VRP 9, line 14 through VRP 10, line 1.
[7] VRP 8, lines 14-17.
[8] VRP 8, lines 18-21.

negligently entrusted the vehicle to Mr. Parker allowing him to drive the vehicle from Oklahoma to Washington despite knowing, when she placed the vehicle in Mr. Parker's control, that his privilege to drive a vehicle was suspended in the State of Washington.[9] Thus, she knew he was incompetent to drive in Washington and that he was intending to leave Oklahoma immediately and drive the vehicle to Washington State.[10]

Additionally, both Oklahoma and Washington have detailed statutory requirements that establish how a car is validly conveyed.[11] Neither state's statutory scheme was complied with and, under both state's laws, the only proper conclusion was that the vehicle was not legally transferred to Mr. Parker.

Finally, Ms. Millam had extensive knowledge about Mr. Parker's prior criminal history, which included four felonies he had committed before he reach twenty years of age.[12] Mr. Parker's criminal record speaks of his recklessness and heedlessness and provides additional evidence to support Mr. Faw's contention that Ms. Millam was negligent in entrusting her vehicle

[9] VRP 16, line 8 through VRP 19, line 18.
[10] VRP 17, line 24 through VRP 18, line 7.
[11] VRP 9, lines 2-5; VRP 11, line 23 through VRP 12, line 5; VRP 14, lines 15-25; and VRP 15, lines 1-2.
[12] CP 48, line 5 through CP 53, line 8.

to Mr. Parker.[13] Ownership of a vehicle, or lack thereof, is not dispositive in a Negligent Entrustment case.

The trial court did indicate she was relying upon Oklahoma law in making her ruling.[14] The choice of law issued has some pertinence to the resolution of the case, although it is the plaintiff's position that under either Oklahoma or Washington law, the Millams were, at a minimum, presumed to be the legal title owner of the vehicle at the time of the accident and, thus, were potentially liable to Mr. Faw pursuant to the negligence cause of action.[15] Moreover, it is Mr. Faw's contention that the Millams are liable to him for the tort of negligent entrustment independent of whether Ms. Millam owned the vehicle at the time of the accident.[16]

II. ASSIGNMENTS OF ERROR

The plaintiff contends that the trial court erred by granting summary judgment in favor of the Millams.

The plaintiff further contends that the trial court erred by admitting into evidence a copy of a purported bill of sale.

The issues pertaining to the assignments of error are as follows:

[13] CP 355-356.
[14] VRP 25, lines 20-21.
[15] VRP 14, line 21 through VRP 15, line 2.
[16] VRP 19, line 15-18.

1. Did Mr. Faw raise an issue of material fact as to whether the Millams were the registered and legal title owners of the vehicle driven by Mr. Parker at the time of the collision?

2. Did Mr. Faw raise sufficient material facts to establish Tara Millam's knowledge of Kyle Parker's recklessness, heedlessness or incompetence to operate a vehicle and was sufficient evidence introduced to establish a breach of her duty of ordinary care to other drivers encountering Mr. Parker on Washington's roadways by negligently entrusting a vehicle to Mr. Parker.

3. Did the court correctly choose Oklahoma law to determine the resolution of the issues before the trial court and was the trial court's application of the disputed facts to Oklahoma law correct?

4. Is Washington and Oklahoma law in sufficient conflict so as to force a court to resolve the conflict?

5. Was the purported bill of sale properly admitted into evidence?

III. STATEMENT OF THE CASE

On August 3, 2009, the plaintiff Joshua L. Faw was very seriously injured as a result of the negligent and reckless driving of defendant, Kyle S.

Parker. Mr. Parker was racing his vehicle on 72nd Street East in Pierce County with another vehicle. Joshua Faw, unfortunately, was driving his vehicle while proceeding in the opposite direction of the two racing vehicles and was struck at a high rate of speed by the vehicle driven by Mr. Parker. The other racing vehicle was never identified. Mr. Faw was rushed to Tacoma General Hospital in Tacoma. He sustained numerous serious and permanent injuries, including his knee cap being almost completely severed and fractured, his right ankle was crushed.[17] Mr. Faw has continuing short term memory problems. He remains disabled and unable to work.

Kyle Parker, at the time of the accident was twenty-one (21) years of age. He already had an extensive criminal background. Mr. Parker was incarcerated in the Pierce County Jail as a result of his plea of guilty to vehicular assault in connection with this accident.[18] Pursuant to his plea of guilty, he admitted to a prior criminal record, which includes four (4) felonies and three (3) misdemeanors.[19] All were entered before Mr. Parker turned twenty (20) years of age. His convictions include theft of a firearm (felony), taking a motor vehicle without permission (felony), escape (felony), and

[17] CP 264, lines 11-15.
[18] CP 70-74.
[19] CP 59-60.

malicious mischief (felony).[20] He also has three misdemeanor convictions for assault, including two related to domestic violence.[21] His criminal history is set forth in his Stipulation on Prior Record and Offender Score filed on September 1, 2010, under Pierce County Superior Court Cause No. 10-1-02886-4.[22]

Importantly, Ms. Millam knew at the time she allegedly conveyed the Toyota Paseo to Mr. Parker that Mr. Parker's privilege to drive in the State of Washington was suspended.[23]

Ms. Millam also was aware of his criminal history.[24] [25]

Ms. Millam also knew that Mr. Parker was immediately leaving for Washington after receiving the vehicle.[26]

Jeffrey and Tara Millam were husband and wife at the time of the accident, although living apart.[27] Mr. Millam was living in a home co-owned by Ms. Millam. Ms. Millam had significant contacts in Washington. She was divorced in Washington subsequent to the accident.[28] No divorce

[20] CP 59-60.
[21] CP 59-60.
[22] CP 59-60.
[23] CP 359, line 22 through CP 360, line 4.
[24] CP 362, line 3, through CP363, line 1.
[25] CP 372, line 15, through CP 373, line 15.
[26] CP 364, lines 7-10.
[27] CP 369, lines 11-17.
[28] CP 369, lines 11-18.

proceeding was pending at the time of the accident.

Tara Millam was the registered owner of the vehicle at the time of the accident. Her name remained on the Certificate of Title.[29]

Ms. Millam had moved to Oklahoma with Mr. Parker earlier in 2009.[30] Mr. Parker testified that the vehicle that he was driving at the time of the accident, a 1992 Toyota Paseo, was purchased by Ms. Millam several months prior to the accident while she was still in Oklahoma.[31] Ms. Millam had also driven the vehicle.[32]

Both Ms. Millam and Mr. Parker claim that the 1992 Toyota Paseo was given to Mr. Parker on or about July 13, 2009 immediately prior to his driving the vehicle to Washington. Both defendants also claim that the gift was memorialized by a Bill of Sale.[33] The registration and title certificate was never transferred by either party in any State.[34] Both Washington and Oklahoma have specific statutory procedures for the valid transfer of a vehicle title. A title holder is, at a minimum, presumed to be the owner of the vehicle in both Washington and Oklahoma. Thus, at the time of the accident

[29] CP 361, lines 6-14.
[30] CP 374, line 22 through CP 375, line 15.
[31] CP 360, lines 5-11; and CP 361, lines 6-8.
[32] CP 360, lines 5-13.
[33] CP 87, Request for Production Response #7; CP 89; CP 214, Para. 4; and CP 361, lines 15-21.
[34] CP 361, lines 6-14.

the vehicle was registered in the name of Tara Millam and she was either the presumed owner of the vehicle or the owner of the vehicle, as it pertains to injured third parties as a matter of law.

Ms. Millam apparently cancelled the insurance coverage on the Paseo on or about July 30, 2009.[35] It is Ms. Millam's and her insurance company's contention that there is no automobile insurance coverage to cover Mr. Faw's loss as a result of Mr. Parker's negligence.[36] Ms. Millam does admit that there may be coverage for the loss under a homeowners insurance policy.[37] She is being defended under that policy.[38]

The original of the purported Bill of Sale does not exist and could not be produced by the defendants.[39] As a result, the credibility of the offered evidence (a copy of the original "Bill of Sale") is very suspect. The failure to produce the original Bill of Sale implies that the original was never given to Kyle Parker as the defendants claim.[40] It supports the inference that the Bill of Sale was manufactured by the defendants after the accident in an attempt to avoid liability.[41] In any event, the purported bill of sale, is flimsy

[35] CP 14, Para 6; CP 214, Para. 6; and CP 381, Inter. No. 2 Answer.
[36] CP 330, lines 24-26.
[37] CP 381, Inter. No. 2 Answer; and CP 381, Inter No. 3 Answer.
[38] CP 381, lines 1-11.
[39] VRP 9, lines 14-20.
[40] VRP 9, lines 21-23.
[41] VRP 9, lines 23 through VRP 10, line 1.

evidence at best and is insufficient as to rebut Tara Millams' presumed ownership of the vehicle. The trial court erred by considering this documentary evidence. The factual issue of the vehicle's ownership liability needs to be resolved by a jury.

Mr. Parker testified that the bill of sale was with the vehicle at the time of the accident.[42] Yet, no such evidence exists to corroborate Mr. Parker's self serving testimony. The location of the "original" is particularly relevant to the resolution of issues of denotive intent and/or the validity of the purported gift. If the original bill of sale could not be located as claimed by Mr. Parker and Ms. Millam, then it would imply that a lack of denotive intent and/or a possibility the purported bill of was conjured after the fact to shield the Millams from liability.

The failure to satisfy the formal statutorily required procedures for the transfer of a vehicle title is also indicative of an incomplete gift. Perhaps the title was retained by Ms. Millams as security for a debt owed to her by Mr. Parker. Mr. Faw objected to the consideration of the copied bill of sale at the summary judgment hearing.[43]

Mr. Parker testified at his deposition that Ms. Millam knew that his

[42] CP 47, lines 22 through CP 48, line 4.
[43] VRP 9, lines 14-18.

drivers license was suspended in the State of Washington.[44] This cogent fact establishes that Ms. Millam was aware that Mr. Parker was incompetent to drive a vehicle in Washington.[45] Ms. Millam also knew Mr. Parker was immediately driving directly to Washington State.[46] Mr. Parker also testified that Ms. Millam knew specifically of his theft of a firearm conviction in January of 2008.[47] He further testified that she "knew I had a record."[48] Ms. Millam knew of this theft of a firearm conviction and of his resulting ten month incarceration.[49] Mr. Parker had only recently been released from jail when he met the Millams' in October of 2008, according to Ms. Millam.[50] At that time, he was homeless and living in a tent with his twin brother, Michael.[51] Mr. Parker had only shortly before that been released from his incarceration on his latest felony. Mr. Parker's mother and father, although both living in the area, did not provide shelter to their sons.

The reasons for Mr. Parker's drivers license suspension were not made completely clear, although Mr. Parker testified at his deposition that the

[44] CP 359, lines 22-24.
[45] CP 359, line 22 through CP 360, line 4.
[46] CP 360, lines 2-4.
[47] CP 48, lines 5 to CP 49, line 7; and CP 363, lines 2-10.
[48] CP 363, line 11 through CP 364, line 8.
[49] CP 48, line 5 through CP 49, line 7; and CP 372, lines 15-19.
[50] CP 370, lines 1-2.
[51] CP 370, lines 24-25.

reason was because he had to obtain insurance.[52] The Washington ADR (abstract of driving record) shows a suspension for failure to maintain proof of insurance.[53] That would imply he was suspended for his felony conviction of taking a motor vehicle without owner permission. It should be noted that Mr. Parker had a very extensive and recent criminal history (four felonies and three misdemeanors) as related in his stipulation of previous criminal history in the case which resulted in his most recent incarceration (i.e., the vehicular assault perpetrated upon plaintiff Joshua Faw).[54] The Millams made no effort to determine what happened to the vehicle after the accident (i.e. who, if anybody, conveyed the title).

IV. ARGUMENT

A. AS IT PERTAINS TO MR. FAW, THE MILLAMS OWNED THE VEHICLE AS A MATTER OF LAW.

1. THREE METHODS OF TITLE TRANSFER.

Modern state vehicle licensing statues are modeled after "Torrens" land title recording systems, such as exist for the recording of real estate titles in Washington. The intent of the formalized transfer statues is to protect third parties who may sell or purchase a vehicle, a party with a

[52] CP 359, lines 17-20.
[53] CP 387.
[54] VRP 355-356.

secured interest in the vehicle and other third parties injured or harmed as a result of the use or operation of the vehicle. Am.Jur2d, Automobiles and Highway Safety, § 30, 31, 32 et. seq.

There are essentially three methods utilized by individual states to transfer titles to vehicles. They are: a. Strict title transfer pursuant to statutory law is required for all purposes; b. Strict title transfer pursuant to statutory procedure is required to effect third party rights; and c. A Certificate of Title provides a rebuttable presumption of ownership.

a. Strict Title Transfer:

States such as Missouri, Ohio, and Michigan require strict compliance with the title transfer statutes in order for a vehicle to be legally transferred for any purpose. In these states, unless ownership is noted on the Certificate of Title and the statutory procedure for the transfer of title having been accomplished, the transfer is void and shall not be valid. *Schultz v. Secretary of State*, 583 NW.2d 886 (Iowa 1998). Thus, even as to parties to the purported vehicle conveyance who don't dispute the transfer, the failure to follow the statutory procedures makes the transfer void.

b. Strict Title Transfer Requirements as to Third Parties:

A slightly less strict title transfer procedure exists in some states. These states require strict compliance of the title transfer statutes to effect the interests of any third parties, other than the buyer and the

seller of the vehicle. These states distinguish between parties to the contract and third parties. In these states, as to all parties other than the buyer and seller of a vehicle; unless ownership is noted on the Certificate of Title, a purported transfer is not valid as to third parties. *Schultz v. Security National Bank*, 583 NW.2d 886 (Iowa 1998).

Some States do not require strict compliance with vehicle title transfer laws in order to effectuate a transfer that effects third parties. See: Section c below. However, the failure to comply with said title transfer results in a rebuttable presumption that the titled owner is, in fact, the owner of the vehicle. Ordinarily, the rebuttable presumption, must be overcome by clear, cogent and convincing evidence.[55]

Washington appears to be a state whose vehicle Certificate of Title statues protect bona fide purchasers, secured parties and third parties who are injured. Thus, Washington apparently requires strict compliance with the vehicle licensing transfer statutes if a transferor desires to avoid owner liability to an injured third party subsequent to the vehicle transfer. RCW 46.12.102 was in effect at the time of the accident August 3, 2009. The statue imposed requirements on a transferor who seeks to avoid liability as a result of an accident occurring subsequent to a transfer of a vehicle. RCW 46.12.102 reads, in pertinent part, as follows:

[55]Plaintiff contends RCW 46.12.102 requires strict compliance in order for a record Title owner to avoid liability to injured third parties. Other commentators take the position that the named title holder is rebuttably presumed to be the owner of the vehicle. Washington Motor Vehicle Deskbook § 2.2(7).

*"**Release of owner from liability — Requirements.***

(1) An owner who has made a bona fide sale or transfer of a vehicle and has delivered possession of it to a purchaser shall not by reason of any of the provisions of this title be deemed the owner of the vehicle so as to be subject to civil liability or criminal liability for the operation of the vehicle thereafter by another person when the owner has also fulfilled both of the following requirements:

(a) When the owner has made proper endorsement and delivery of the certificate of ownership and has delivered the certificate of registration as provided in this chapter;

(b) When the owner has delivered to the department either a properly filed report of sale that includes all of the information required in RCW 46.12.101(1) and is delivered to the department within five days of the sale of the vehicle excluding Saturdays, Sundays, and state and federal holidays, or appropriate documents for registration of the vehicle pursuant to the sale or transfer."

Neither requirement of RCW 46.12.102 was completed by the Millams or Mr. Parker. No endorsement or delivery of the Certificate of Title and registration was effected by the Millams. No report of the transfer was made to the department of licensing either, despite the fact he had been in Washington for several days prior to the accident.

The Millams did not report the transfer of the vehicle within five days as required by the statue.

It should also be noted that RCW 46.12.101(3), as enacted in 2009, required a transferee to apply for a new Certificate of Title within fifteen days of transfer of the vehicle. Mr. Parker did not accomplish that requirement either.

The actual transfer with the Certificate of Title requires the proper execution of several statutorily required steps in both Oklahoma and Washington State. These steps include odometer statements signed by the seller. RCW 46.12.101. Okla. Stat. tit. 47, § 1007 and § 1112.

These required steps also include a signed release of interest and warranty of title (notarized in Oklahoma) on the transferors title certificate. Okla. Stat. tit. 47, § 1107(a). The certificate signed by the transferor must be delivered to the transferee. *Id.* The transfer statues in both states require fees on transfer, vehicle inspections, if necessary, and in Oklahoma, proof of insurance by the transferee. Okla. Stat. tit. 47, § 1112.3(a).

Prior to even using a sold or transferred vehicle, a transferee, in Oklahoma, is required to obtain new vehicle registration by presenting the properly signed and notarized assignment of Certificate of Title to the Oklahoma Tax Commission, or it's subagents, so that a new Certificate of Title will then be issued. *Id.* The transferee must then take the newly issued title to register the vehicle. Registration requires, among other things, proof that the vehicle is insured. Okla. Stat. tit. 47, § 1112.3(a).

Thus, to validly transfer a vehicle to another in Oklahoma, compliance with the title and registration requirements of that state must occur.

Ms. Millam has produced no evidence that she ever

signed the Certificate of Title in front of a notary public releasing her interest in the vehicle. Okla. Stat. tit. 47, § 1007. Thus, she did not validly transfer ownership of the vehicle under Oklahoma law. *Id.* There is no evidence that Mr. Parker could, or did, obtain insurance on the vehicle as required to obtain registration of the vehicle in Oklahoma. Okla. Stat. tit. 47, § 1112.3(a).[56]

No evidence was produced by the defendants that any of the statutory provisions in either state pertaining to the transfer of the Certificate of Title were complied with by any of the defendants.

c. Certificate of Title Provides Rebuttable Presumption of Ownership.

It is Mr. Faw's position that Washington belongs in either of the two categories described in Sections A and B above. A third category also exists; that a Certificate of Title provides a Rebuttable Presumption of Ownership.

It is uncertain in what category Oklahoma fits, as there are only two reported cases after the 1985 adoption of the Oklahoma Vehicle Title Transfer Statutes. Okla. Stat. tit. 47, § 1007, et seq. Neither of these cases are applicable to the present case, as both concern questions of title based upon contract between parties to the purported transfer. *Reid v. Tinker Auto Sales,* 786 P.2d 174 (Okla. 1990). *Arvest v. Spirit Bank*, 191 P.3d 1228

[56] The title could not have been transferred to Mr. Parker in Oklahoma without him providing proof of insurance and following to other statutory required procedures.

(Okla. 2008). Mr. Faw contends that the detail of Oklahoma statutory procedures to transfer a vehicle title would indicate that, to effect the rights of third parties, the title must be transferred properly according to the statutory procedures requiring written assignment of interest on the back of the Certificate of Title. Thus, Oklahoma would probably be in category (b) above.

Oklahoma Title Transfer Statutes also require a transferor seeking to avoid liability pursuant to a transfer of a vehicle to notify the licensing authorities upon the transfer of the vehicle in order to be presumptively presumed not to be the owner of the vehicle. Okla. Stat. tit. 47, § 1107.4.

The Oklahoma statue indicates the named title holder is presumed to be the owner of the vehicle.[57]

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[57]The Oklahoma statute reads as follows:

"§ 47-1107.4. Written notice of transfer – Fee – Presumptions.

A. Upon the transfer of a vehicle, the transferor may file a written notice of transfer with the Tax Commission or a motor license agent. On receipt of a written notice of transfer, the Commission shall indicate the transfer on the vehicle records maintained by the Commission. The written notice of transfer shall contain the following information:

1. The vehicle identification number of the vehicle;

2. The number of the license plate issued to the vehicle, if any;

3. The full name and address of the transferor;

4. The full name and address of the transferee;

5. The date the transferor delivered possession of the vehicle to the transferee; and

6. The signature of the transferor.

B. There shall be assessed a fee of Ten Dollars ($10.00) when filing the notice of transfer. Seven Dollars ($7.00) of the fee shall be retained by the motor license agent. Three Dollars ($3.00) of the fee shall be apportioned to the

The choice of law issue was resolved without elaboration by the trial court in favor of Oklahoma. The trial court did not explain whether Oklahoma law was to be applied to the issue of ownership of the vehicle or the issue of negligent entrustment, or both. Having solely referenced Oklahoma in her brief remarks in the record, it is assumed that the trial court applied Oklahoma law in resolving both issues.

But it is clear that, as to the ownership issue under either Oklahoma or Washington law, Mr. Faw raised an issue of material fact sufficient to survive summary judgment as to the ownership of the vehicle driven by Mr. Parker at the time of the accident. This is because, under Washington statute, the Millams are strictly liable for failing to satisfy the Washington statutory requiring a report of sale to the Department of Licensing. Likewise, it appears that Oklahoma most probably fits in the category of states which requires completion of Certificate of Title statutory transfer procedures to effect the rights of third parties.

However, under any interpretation of Washington or Oklahoma law, there is, at a minimum, a rebuttable presumption that the Millams owned the

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Oklahoma Tax Commission Reimbursement Fund.

C. After the date of the transfer of the vehicle as shown on the records of the Commission, the transferee of the vehicle shown on the records is rebuttably presumed to be:

1. The owner of the vehicle; and

2. Subject to civil and criminal liability arising out of the use, operation, or abandonment of a vehicle, to the extent that ownership of the vehicle subjects the owner of the vehicle to civil or criminal liability pursuant to law."

vehicle. To rebut the evidence, the Millams were required to submit "clear, cogent and convincing" evidence, which they did not accomplish. In any event, the issue of the vehicle's ownership needs to be resolved by a jury.[58]

Thus, under either Washington or Oklahoma law, an issue of material fact as to the Millams' ownership of the vehicle was raised by Mr. Faw. The determination of what of the three categories of title transfer Oklahoma or Washington are in will effect the evidence and burden of proof and the factual resolution of the issues at trial. But, ultimately, whatever of the three categories apply and whichever state's law is to be applied, the factual dispute as to ownership of the Millam/Parker vehicle needs to be resolved by a jury.

B. A TRANSFER OF A VEHICLE BETWEEN PARTIES TO A CONTRACT MAY BE RECOGNIZED AS VALID BETWEEN THEMSELVES, BUT NOT TO A THIRD PARTY.

It should be noted that, at summary judgment, every case cited by the defendant to the trial court in support of their position that the vehicle was properly transferred to Mr. Parker concerns issues of contract or gift law as applied to two parties to the purported contract or gift. In a situation such as that, i.e., where two parties to a transaction are contesting the ownership of a vehicle, there is no motive on the part of both parties to fabricate a lie about the true ownership of the vehicle. Both parties in those cases are contesting

[58] It is argued in the previous paragraph that Oklahoma belongs in category A.1(b), described Section B above.

ownership of the vehicle and, presumably, both want the vehicle. The parties interests are not aligned.

In the present case, however, both parties to the purported contract have a strong motivation to lie. In fact, it is Mr. Faw's position that Kyle Parker and Tara Millam are lying about the purported transfer of the vehicle.

Many legislatures have dealt with this apparent problem by instituting specific statutes, which toll the application of a title transfer to a third party pending satisfaction of the State's transfer statutes. Washington, as argued above, had such a strict statute, RCW 46.12.102 at the time of the accident, which required strict compliance in order for a an owner/transferor to be released from liability as a result of a sale. Washington has recodified and amended former RCW 46.12.102 as RCW. 47.12.655.

RCW 46.12.102 was in effect on the date of the accident and required that the owner/transferor to notify the Department of Licensing within five days of the sale if the transferor desired to avoid liability as owner of the vehicle. That was not done in this case in Washington; nor was it done in Oklahoma.[59]

A comparable Oklahoma statute also allows the owner/transferor seeking a release from post-transfer liability, to send notice of the transfer to that State's Department of Licensing in order to avoid post sale owner liability. Okla. Stat. tit. 47, § 1107.4. (See footnote 2 on page 18.) Again,

[59] RCW 46.12.102

that was not done in this case. Both the Washington and Oklahoma statutes are intended to protect injured third parties from a post-accident claim of vehicle transfer by the title holder.

C. WASHINGTON LAW CONTROLS.

It is plaintiff's contention that Washington law controls in this case. But, the ultimate result would be the same under either state's laws; the trial court's ruling was incorrect in either event. This is not a contractual case between first and second parties to a contract. It is a tort case involving an injured third party. Thus, the choice of the law rules for torts would apply.

The first issue is to determine the ownership of a vehicle for purposes of third party liability when someone other than the certificate title holder was driving the vehicle whose driver caused a third party injury. This issue requires a factual resolution by a fact finder which the trial court's ruling forecloses. This is the error made by the court.

The second issue is under what circumstances is a transferor of a vehicle who fails to follow statutory requirements to notify the state licensing authorities of a change in vehicle ownership is liable to third parties injured subsequently by the transferee as a result of the transferor or remaining the Certificate of Title owner.

To resolve these issues, a court must choose which state's law to apply. The law requires that the State law with the most significant contacts to the parties be applied. Restatement (Second) Conflict of Laws, § 145 and

§ 146 (1971).

Clearly, Washington has the most significant contacts in terms of the parties and the torts that are alleged. Mr. Millam has lived throughout all relevant times in Washington. Mr. Parker lived his entire life in Washington prior to his departure to Oklahoma in February of 2009.[60] Mr. Parker also has lived in Washington since he arrived in Washington shortly after his departure from Oklahoma on July 13, 2009. Ms. Millam, likewise, until February 2009, lived her entire life in Washington. She was married in Washington.[61] She was divorced in Washington after the accident.[62]

Mr. Faw has lived his entire life in Washington.

The accident occurred in Washington.

So, therefore, the issue isn't who owned the vehicle in a controversy between Mr. Parker and Ms. Millam, but rather who owned the vehicle by operation of law as to third parties for purposes of imposing tort liability on said Certificate of Title owner. Clearly, under Washington law, the owner is and remains Tara A. Millam.

The Restatement (Second) Conflict of Laws, § 145 and § 146, set forth the general rules in regards to the Choice-of-Law issue pertaining to torts. § 145 reads as follows:

"§ 145. The General Principle.

[60] CP 32, line 24 through CP 33, line 2.
[61] CP 82, Interrogatory Answer No. 1.
[62] CP 369, lines 13-19.

(1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.

(2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:

(a) the place where the injury occurred,

(b) the place where the conduct causing the injury occurred,

(c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and

(d) the place where the relationship, if any, between the parties is centered.

These contacts are to be evaluated according to their relative importance with respect to the particular issue."

§ 145 clearly adopts the "most significant relationship" test in determining the proper choice of law.

Even more specifically, § 146 relates directly to personal injuries and reads as follows:

"§ 146. Personal Injuries

In an action for a personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied."

Clearly, in regards to a personal injury matter, the local law of the

state where the injury occurred determines the rights and liabilities of the parties. Washington is that state.

§ 146 of the Restatement (Second) Conflict of Laws requires that the law of the state where the injury occurred is to be applied, unless *". . . some other state has a more significant relationship to the occurrence and the parties . . ."*[63]

Of the Choice-of-Law Principles specified in the Restatement (Second) Conflict of Laws § 6, clearly the relevant policies of the forum weighs in favor in Washington law being applied. Restatement (Second) Conflict of Laws § 6 reads, in pertinent part, as follows:

> *"**§ 6. Choice-of-Law Principles***
>
> *(1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.*
>
> *(2) When there is no such directive, the factors relevant to he choice of the applicable rule of law include*
>
> *(a) the needs of the interstate and international systems,*
>
> *(b) the relevant policies of the forum,*
>
> *(c) the relevant policies of other interested states and the relative interest of those states int the determination fo the particular issue,*
>
> *(d) the protection of justified expectations,*
>
> *(e) the basic policies underlying the particular field of law,*

[63] § 145 and § 145.

(f) certainty, predictability and uniformity of result, and

(g) ease in the determination and application of the law to be applied."

Oklahoma statutory law is not in a direct conflict with Washington statutory law. Mr. Faw contends that both states require statutorily required steps to transfer ownership of a vehicle for purposes of effecting third parties, such as Mr. Faw. At a minimum, a rebuttable presumption exists under Oklahoma laws that the Certificate of Title owner is, in fact, the owner of the vehicle. Both states allow transferors some shield to liability if they properly and timely file a notice of sale with the state licensing authority. No such report of sale was filed by Ms. Millam in either state. The Certificate of Title release of interest was never signed by Ms. Millam. There were issues of material fact on the issue of ownership raised by Mr. Faw sufficient to defend the Millams' summary judgment motion.

Under both Washington and Oklahoma law, even if this court determines that strict compliance of state vehicle licensing and registration laws is not necessary, Ms. Millam is, at a minimum, faced with overcoming a rebuttable presumption that she is the owner of the vehicle. The documentary evidence proffered by Ms. Millam and Mr. Parker so far is inadmissible as the original no longer exists (ER 1002). The existence of the original is in substantial doubt and, even if the documentary evidence is admissible, it is insufficient to establish as a matter of law by clear, cogent

and convincing evidence that, in fact, the transfer of the vehicle was accomplished in a manner necessary to shield Ms. Millam from a rebuttable presumption of ownership. Clearly, that has not been established by any stretch of the imagination.

In a similar case dealing with analogous facts, an Oregon court found, as a matter of law, insufficient evidence to overcome the presumption of ownership established by the Certificate of Title. *Fisher v. Pippin*, 595 P.2d 513 (Oregon 1979). In that case, the court ruled as a matter of law that the testimony of the three interested witnesses, i.e., a father, mother and son, was insufficient to overcome the rebuttable statutory presumption establishing ownership in the father. The testimony of the three interested witnesses was that the father had sold the vehicle to the son, that the son had fully paid for the vehicle, was the only person to drive the vehicle, and all upkeep for the vehicle by the son. The title had never been transferred to the son.

The court emphasized that clear, cogent and convincing evidence requires more than self-serving statements of interested parties trying to avoid liability. The court held the proffered evidence insufficient as a matter of law and found the father liable as the owner of the vehicle.

That is exactly the case here. The defendant, Tara Millam, is trying to avoid liability based on her own self-serving statement and, quite possibly, the use of a manufactured document, which has no indicia of reliability and which, of course, cannot comply with the liability shield statute, RCW

46.12.102 or the other applicable licensing and title transfer statues of Oklahoma and Washington. The copied document itself is inadmissible pursuant to ER 1002.

The defendants have tried to compare a vehicle to a piece of furniture by citing to the Restatement (First) § 3 concerning chattels while ignoring the detailed state licensing transfer statutes.[64]

The Restatement (Second) Conflict of Laws, as it pertains to transfers of chattels, does not support defendants' position. § 244 rends as follows:

> ***"§ 244. Validity and Effect of Conveyance of Interest in Chattel.***
>
> *(1) The validity and effect of a conveyance of an interest in a chattel as between the parties to the conveyance are determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the parties, the chattel and conveyance under the principles stated in § 6.*
>
> *(2) In the absence of an effective choice of law by the parties, greater weight will usually be given to the location of the chattel, or group of chattels, at the time of the conveyance than to any other contact in determining the state of the applicable law."*

As is noted, § 244 is limited by its terms to transaction between the parties. Restatement (Second) Conflict of Laws, § 244(1).

The specific limitation of § 244(1) limiting its' application to only the parties to the conveyance supports Mr. Faw's position that, as to vehicle transfers and their impact on third parties, other, more specific law, controls.

[64] CP 277, lines 7-13; and CP 283, lines 6-7.

Both the Washington and Oklahoma statutes require certain steps be taken by a vehicle transferor in order for the transferor to avoid subsequent liability for the transferee's negligent acts while operating the transferred vehicle.

D. LIABILITY FOR NEGLIGENT ENTRUSTMENT IS NOT DETERMINED BY OWNERSHIP.

Defendants incorrectly postulated this case as a chattel transfer issue to be resolved as a Conflict of Laws case. Further, the defendant incorrectly postulated that the ownership of the vehicle is determinative to both the plaintiff's causes of action. That is not the case. Therefore, defendants argument that the resolution of ownership determines their liability (i.e., they were not the owner so, therefore, they were not liable) is incorrect. The trial court erred by, apparently, accepting this argument. Liability for negligent entrustment does not depend upon ownership of the vehicle. That is the case under either Oklahoma or Washington law. Washington law also has a general negligence theory, independent of ownership, pursuant to the facts of this case.

Mr. Faw argues that Oklahoma law does not control the outcome of the case. The accident occurred in Washington. Tara A. Millam had significant contacts to Washington as she remained married and owned a home in Washington. Kyle Parker was returning to live in Washington. Mr. Parker spent a large portion of his teenage years incarcerated in Washington. Mr. Millam remained living in Washington throughout the entire time period.

Mr. Faw lived in Washington. Clearly, for most if not all issues pertaining to this case, Washington law should control.

In any event, legal ownership of a vehicle, is not necessary in order for a person to be liable in Oklahoma for the tort of Negligent Entrustment or by analogy pursuant to Restatement (Second) of Torts § 302(b) (1965). *Green v. Harris*, 70 P.3d 866 (Okla. 2003). This is also the law in Washington. *Cameron v. Downs*, 32 Wn.App. 875, 650 P.2d 260 (1982).

Green v. Harris, supra., was cited in Defendants Millams' summary judgment brief incorrectly as supporting defendants' position.[65] It supports plaintiff's position. The Court in *Green, supra.,* upon conflicting evidence, found that a mother, who was not on the Certificate of Title (the father was on the title), was an owner of the vehicle.

Defendant's reliance was likewise misplaced in *Cuesta v. Ford Motor Co.*, 209 P.3d 278 (Okla. 2009). *Cuesta, supra.,* is a choice of laws case that indicates that, in a conflict of laws case as it pertains to torts, the significant contacts of the parties to each State is dispositive. Washington had the most significant contacts to the parties in the present case.

Washington common law sets forth a rebuttable presumption of ownership, such that a registered owner of a vehicle is the presumed owner of the vehicle. *Wildman v. Taylor,* 46 Wn.App. 546, 731 P.2d 541 (Div. II 1987). A rebuttal presumption creates a factual issue that a jury must resolve.

[65] CP 278, line 6-8.

It is Mr. Faw's contention, however, that the resolution of ownership of a vehicle as applied to a third party is, for this case, controlled by the strict liability statute RCW 46.12.102. Ms. Millam complied with none of the vehicle transfer statutes of either state.

Defendants did not address the choice of law issue as it pertains to general negligence or negligent entrustment. In any event, it is not required that a plaintiff show ownership of a vehicle at the time of plaintiff's injury if the injury was proximately caused by defendant's actions in relinquishing control of the vehicle to the wrong person. That is the law under both Washington and Oklahoma law.

E. THE PLAINTIFF'S CLAIM OF NEGLIGENT ENTRUSTMENT OF THE VEHICLE BY THE MILLAMS IS SUFFICIENT TO SURVIVE SUMMARY JUDGMENT.

In Washington, the law of negligent entrustment is as follows:

> *"A person entrusting a vehicle may be liable under a theory of negligent entrustment only if the person knew, or should have known in the exercise of ordinary case, that the person to whom the person that the vehicle was entrusted is reckless, heedless, or incompetent."* *Cameron v. Downs*, 32 Wn.App. 875, 877, 650 P.2d 260 (1982). *Mejaia V. Erwin,* 45 Wn.App. 700, 726 P.2d 1032 (1986).

It should be noted that:

> "*A person may be in control of a vehicle, for purposes of negligent entrustment, even though the person does not own a vehicle." Mejaia, Supra,* § page 703, citing *Cameron v. Downs*, 32 Wn.App. 875, 877, 650 P.2d 260 (1982).

The concept of Negligent Entrustment is defined similarly in Oklahoma:

> *"An actionable, common law claim for negligent entrustment exists when a person who owns or has possession and control of an automobile allows another driver to operate the automobile when the person knows or reasonably should know that the other driver is careless, reckless, and incompetent, and an injury results therefrom. The question of negligent entrustment is one of fact for the jury. Such facts may be proved by circumstantial as well as positive or direct evidence."* *Green v. Harris*, 70 P.3d 866 § 868 (Okla. 2003).

Oklahoma also has codified the common law tort of negligent entrustment. Okla. Stat. tit. 47, § 6-307 imposes liability on one who knowingly permits the operation of a vehicle by a person not qualified. *Green v. Harris*, 70 P.3d 866 (Okla. 2003).[66] The resolution of the choice of law issue may be important because the Millams have argued that Mr. Parker was licensed in Oklahoma, although clearly he was on a suspended status in Washington. But, even if Oklahoma law applies, a factual issue to be resolved by the fact finder would remain.

Ms. Millam knew Mr. Parker's privilege to drive in Washington was suspended. Thus, she knew Mr. Parker was incompetent as a matter of law to operate a vehicle in Washington. Washington statutory law prohibits entrusting a vehicle to an unlicensed driver. RCW 46.16.011. That is exactly

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[66] Okla. Stat. tit. 47, § 6-307 reads as follows:

> *"§ 6-307. Liability for Knowingly Permitting the Operation by a Person Not Qualified*
>
> *Any person as herein defined, who is the owner of any motor vehicle and knowingly permits such motor vehicle to be operated by any person who is not qualified to operate a motor vehicle under the provisions of this act, shall be held civilly liable as a joint tortfeasor for any unlawful act committed by such operator."*

what Tara Millam did; she entrusted her vehicle to Mr. Parker despite knowing he was leaving in the vehicle for Washington where his license to drive was suspended. Thus, he was incompetent and Tara Millam knew so. As soon as Mr. Parker drove the vehicle into Washington, Ms. Millam violated RCW 46.16.011.

Both Washington and Oklahoma have similar definitions of the common law tort of Negligent Entrustment. In that there is no conflict in the laws of the two states, it is not necessary to analyze the issue further. Under either State's law, the plaintiff has made out a primae facie case of Negligent Entrustment.

There were other facts pointing to Tara Millam's negligence in entrusting the vehicle to Mr. Parker besides his suspended license status in Washington.

In the present case, it is undisputed that Ms. Millam knew that Mr. Parker had an extremely irresponsible background having knowledge, at a minimum of, his frequent homelessness, his estrangement from his family, his most recent felony conviction, his criminal record and her knowledge that he was suspended as a driver in the State of Washington. She also knew that, when she purportedly gave the vehicle to Mr. Parker shortly before he drove to Washington, that he was immediately driving directly to the State of Washington.[67] She also knew that, after July 30, 2009, there was no longer

[67] CP 175, lines 12-16.

any insurance on the vehicle.

Mr. Parker's background is one of extreme irresponsibility and criminal behavior. He had previously been convicted of car theft which is a felony involving a vehicle.

No responsible person would entrust a vehicle with Mr. Parker knowing that he was so irresponsible and statutorily incompetent to drive in Washington. That is particularly the case when the purported transfer of the vehicle was not sufficient to allow the vehicle to be re-titled in Mr. Parker's name nor registered and re-titled in Washington. Ms. Millam, had she desired a statutory release from liability, should have followed the statutorily specified title transfer procedures. Both Washington and Oklahoma require much more than a copied bill of sale to effectuate a vehicle ownership transfer and terminate an injured third party's rights to pursue an owner of a vehicle driven by a tortfeasor. In Oklahoma, the legislature has statutorily completely preempted the field of legislation pertaining to vehicle transfers.[68]

The Defendants Millam have contended that they had conveyed the vehicle by gift to Mr. Parker on July 13, 2009, and, thus, they cannot be held

[68] Okla. Stat. tit. 47, § 1115.2(A) reads as follows:

"§ 1115.2. Preemption – Registration and Licensing of Automobiles

A. The legislature hereby occupies and preempts the entire filed of legislation in this state touching in any way the enforcement of registration and licensing of automobiles to the complete exclusion of any order, ordinance, or regulation by any municipality or other political subdivision of this sta.e Any existing or future orders, ordinances, or regulations in this field, except as provided for in subsection B of this section, are null and void."

accountable for his conduct. That is an incorrect analysis of the law of Negligent Entrustment and negligence in general. *"As a general rule, ownership at the time of entrustment is what governs ownership analysis in the negligent entrustment context."* 23 C.O.A 2d, 265 at 292. *Flieger v. Barcia*, 674 P.2d 299 (Alaska 1983). As explained by the Colorado Supreme Court in *Casebolt v. Cowan,* 829 P.2d 352 (Colo. 1992), whether a defendant acted negligently is measured at the time of entrustment. Therefore, the entrustor's right and ability to exercise control over a vehicle at the time of the entrustee's negligent act is not determinative of liability for Negligent Entrustment. Thus, Ms. Millam was negligent the moment she entrusted her vehicle to Mr. Parker (purportedly by gift) knowing of his propensity for reckless, heedless, and incompetent behavior, particularly as it pertains to driving. Who actually held the title at the time of the accident is irrelevant as it pertains to the tort of negligent entrustment.

So, the issue becomes whether or not there is a factual showing by the plaintiff on the issue of negligent entrustment that is sufficient to survive a motion for summary judgment. Ordinarily, the issue of negligence is a matter for the jury. *Mejaia v. Erwin,* 45 Wn.App. 700, 705, 726 P.2d 1032 (Div. II 1986.)

Even if Ms. Millams and Mr. Parker's contention is that the vehicle was gifted to him is correct, that doesn't relieve the Millams from liability. In *Talbott v. Csakany*, 199 Cal.App.3d, 700, 245 Cal.Rptr. 136 (4th Dist.

1988), the Court held that it was proper to extend liability post gift to the donor of a vehicle on a Negligent Entrustment theory. A summary of the case and the reasoning behind the result is set forth below:

> *"The Court first addressed the issue of whether liability for negligent entrustment, in the right factual circumstances, could be imposed on a donor. The court answered that issue in the affirmative, explaining (1) that the tort of negligent entrustment imposes liability on one who supplies an instrumentality to an incompetent person under circumstances indicating a likelihood of misuse, (2) that liability does not depend on a special relationship between the donor and donee or the victim, or on whether the donee is an adult or minor, or continued ownership in the donor, or type of dangerous instrumentality supplied, and (3) that the maturity of the donee and the fact that the donee may be subject to direct control and residing with the donor should be liable. Applying this analytical framework to the facts of the case at hand, the court first noted that there was no allegation that the donee was in any way subject to the control of the donor. Nevertheless, the court concluded that even when there is no evidence of control, since the foreseeability where the facts show sufficient causation."* *Talbott v. Csakany*, 199 Cal.App.3d, 700, 245 Cal.Rptr. 136 (4th Dist. 1988).

Negligent Entrustment of a Vehicle, 23 C.O.A. 24, 265, § 9.

F. MR. PARKER WAS STATUTORILY INCOMPETENT PURSUANT TO WASHINGTON LAW AND TARA MILLAM COMMITTED NEGLIGENCE PER SE

Washington law makes it unlawful for any person in whose name a vehicle is registered to permit a motor vehicle to be operated by an unlicensed driver.

RCW 46.16.011 was in effect at the time of the accident. RCW 46.16.011 reads as follows:

*"**Allowing unauthorized person to drive — Penalty.***

It is unlawful for any person in whose name a vehicle is registered knowingly to permit another person to drive the vehicle when the other person is not authorized to do so under the laws of this state. A violation of this is a misdemeanor."

Oklahoma law is similar. Okla. Stat. tit. 47, § 6-307 reads as follows:

"§ 6-307. Liability for Knowingly Permitting the Operation by a Person Not Qualified.

Any person as herein defined, who is the owner of any motor vehicle and knowingly permits such motor vehicle to be operated by any person who is not qualified to operate a motor vehicle under the provisions of this act, shall be held civilly liable as a joint tortfeasor for any unlawful act committed by such operator."

Tara Millam knew, at the time that she entrusted her vehicle to Kyle Parker, that his privilege to drive a vehicle in the State of Washington had been suspended. She also admits that she knew generally of his background, lifestyle and criminal history. As a result, Tara Millam knew or should have known that Mr. Parker was incompetent and also would likely be reckless or heedless in the operation of that vehicle. She became a joint tortfeasor by operation of law because she knew Mr. Parker was incompetent to drive in Washington.

In Washington, it has been held that entrusting a motor vehicle to a person who is unlicensed is negligence per se. *Atkins vs. Churchill*, 30 Wn.2d 859, 194 P.2d 364 (1948). In that case, a father entrusted his vehicle to his fourteen (14) year old daughter who, subsequently, allowed another

unlicensed driver to drive the vehicle. A collision resulted. The Court held that allowing an unlicensed driver to drive a vehicle in the State of Washington is negligence per se. *Atkins, supra.*, has never been overruled. Like the minors in *Atkins, supra.*, Mr. Parker was also statutorily incompetent. Consequently, Ms. Millam, by giving or loaning her vehicle to Mr. Parker, and in knowing that he was immediately driving the vehicle to Washington State where his privilege to drive was suspended, breached her duty of reasonable and ordinary care. In fact, the great weight of authority throughout the United States supports this proposition. See: Negligent Entrustment of Motor Vehicle to Unlicensed Driver, 556 ALR 4th 1100. The Court in *Atkins, supra.*, explained it's ruling as follows:

> "[t]here was ample evidence to warrant submission to the jury of the question of negligence of appellant in entrusting his automobile to an unlicensed minor. *Forman vs. Shields,* 183 Wash. 333, 48 P.2d 599; *Smith vs. Nealey,* 162 Wash. 160, 298 P. 345. See, also, annotation, 168 A.L.R. 1364 et seq. In that annotation is collected the cases which support the general rule that the owner of a motor vehicle, who entrusts the vehicle in the hands of an [194 P.2d 368] unfit person, thereby enabling the latter to drive it, may be held liable for an injury negligently inflicted by the use made of the vehicle by its driver as a proximate result of the incompetency or unfitness of the driver, although the use being made of the vehicle at the time of the injury was beyond the scope of the owner's consent. The authorities uniformly hold that it is negligence per se for the owner of a motor vehicle to entrust it to a minor under the age specified by statute. The prohibitory enactment itself constitutes a conclusive declaration that an individual younger than the age designated is incompetent to drive a motor vehicle."

Atkins, supra., 30 Wn.2d 859 § 865.

The *Atkins, supra.*, ruling is even more applicable to a situation involving a driver with a suspended license as that driver is subject to even more suspicion by a reasonably prudent person pertaining to his competence to drive than an unlicensed driver.

The plain meaning of the word incompetent or incompetency establishes that Mr. Parker was statutorily incompetent to drive a motor vehicle in the State of Washington. Webster's New Collegiate Dictionary, (G & C Merriam Company, 1977) defines incompetent as "not legally qualified." Black's Law Dictionary (5th Ed., 1979) defines incompetency as "a lack of legal qualification."

An owner of a vehicle has a duty to ensure that a driver is competent. Knowledge of certain facts, such as recent arrests for traffic violations, will put the owner on notice that he should enquire further into the driver's ability to drive in conformity with the law, *Hartford ACCI and Indem Co. vs. Abdullah*, 94 Cal.App.3d 81, 156 Cal.Rptr. 254, (1979).

In another case, *Dillan vs. Suburban Motors Inc.*, 212 Cal.Rptr 360, 166 Cal.App.3d 233 (1985), the Court held that a car dealer who sold a vehicle to a mother for use by her seventeen (17) year old son, could be held liable for Negligent Entrustment where the dealer knew at the time of the sale that the son was unlicensed to drive in the State of California, although he was licensed to drive in the State of Missouri. The Court concluded that when he changed his residency to California that the son had a duty to obtain

a California State driver's licenses. The Court further held that the facts at issue presented a jury question as to whether or not the dealer was negligent for entrusting the vehicle to an unlicensed driver. The Court indicated that the facts available to the dealer were such that he had a duty to enquire about the competency of the seventeen (17) year old that the car was intended for. As the son was statutorily incompetent; having failed to obtain a California State driver's license, these circumstances presented a jury question in regards to the dealers Negligent Entrustment of the vehicle.

It should be noted that the Court in *Dillan, supra.*, dismissed the dealership's contention that they were immune from liability because they transferred the title at the time of the sale.

> *"Retention of actual ownership of the vehicle is not a prerequisite for liability under the common law doctrine of Negligent Entrustment. If a claimant's evidence demonstrates that the person (private owner, renter, or seller of the vehicle) had actual knowledge or knowledge of facts from which that person should have know the purchaser or driver was unlicensed, such knowledge is sufficient to place a duty of enquiry into such competency on such a person." Dillan, supra.*, 166 Cal.App.3d 233, 212 Cal. Reporter 360 § 366.

Tara Millam committed an act of negligence when she knowingly entrusted her vehicle to Kyle Parker knowing that he was immediately taking the vehicle to back to Washington State where he was an unlicensed, suspended driver. The finding of negligence is required by the case of *Atkins vs. Churchill, supra.*, and RCW 46.16.011.

Incompetent means lack of legal qualifications. Thus, Mr. Parker was

statutorily incompetent to drive a motor vehicle in the State of Washington and Tara Millam was negligent in entrusting her vehicle to Mr. Parker so he could drive the vehicle in Washington State.

G. PLAINTIFF MAY PURSUE A GENERAL THEORY OF NEGLIGENCE AGAINST THE MILLAMS.

A recent Washington case recognizes a cause of action for negligence under facts similar to the present case pursuant to the Restatement (Second) of Torts § 302(b) (1965). Ownership of the vehicle is irrelevant. *Parrilla v. King County*, 138 Wn.App. 427, 157 P.3d 879 (2007). In *Parrilla, supra.*, a metro bus driver abandoned a running bus leaving a passenger in the bus who subsequently took it for a joy ride.

The Court further explained its holdings that *"A duty to guard against a third parties' foreseeable criminal conduct exists where an actors own affirmative act has created or exposed another to a recognizable high degree of risk of harm through such misconduct, which a reasonable person would have taken into account." Parrilla v. King County*, 138 Wn.App. 427 § 439, 157 P.3 879 (Div. 1 2007).

The holding in *Parrilla, supra.*, was based upon the Court's reasoning that Restatement (Seconds) of Torts § 2(b) (1965), and Washington's interpretation thereof in *Kim v. Budget Rent a Car System, Inc.*, 143 Wn.2d 190, 194-195, 15, P.3d 1283 (2001), established that, in situations such as the present case where it is reasonably foreseeable that the actor to whom a

vehicle has been entrusted would engage in intentional or criminal conduct, a duty owed to an injured party may be breeched. That, in fact, was the holding the Court in *Parrilla, supra.*, where a metro bus had been left running by a driver who left the only occupant alone in the vehicle. That occupant had engaged in bizarre behavior and eventually stole the bus.

Clearly, Ms. Millam knew that Mr. Parker would be engaging in criminal behavior, driving while his license was suspended in Washington, as soon as he crossed the border into Washington while driving the vehicle.

Mr. Parker's social history and criminal background is additional evidence that Tara Millam negligently entrusted the vehicle to Mr. Parker based upon the Restatement (Second) of Torts 302(b).

The *Parrilla, supra.,* Court relied on Restatement (Second) Torts § 302(b), *supra.*

> Our determination that a duty of care exists under the circumstances here alleged is compelled by RESTATEMENT (SECOND) OF TORTS § 302 B (1965), and our Supreme Court's interpretation thereof. See *Kim*, 143 Wn.2d at 196-98, 15 P.3d 1283. Section 302 B provides:
>
> *"An act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the conduct of the other or a third person which is intended to cause harm, even though such conduct is criminal."* [157 P.3d 883].
>
> An official comment to that section elaborates:
>
> *"There are ... situations in which the actor, as a reasonable man, is required to anticipate and guard against the intentional, or even criminal, misconduct of others. In general, these situations arise where the actor is under a*

> *special responsibility toward the one who suffers the harm, which includes the duty to protect him against such intentional misconduct; or where the actor's own affirmative act has created or exposed the other to a recognizable high degree of risk of harm through such misconduct, which a reasonable man would take into account."* Page 435, § 302(b) cmt. e (emphasis added).

Our Supreme Court discussed § 302 B in *Kim, supra.,* 143 Wn.2d at 196-98, 15 P.3d 1283. While *Kim, supra.,* held that the provision did not support the imposition of a duty of care under the particular circumstances of that case, the Court acknowledged that the duty of care may exist under other circumstances:

> *"As comment e to the section explains, a duty to guard against third party conduct may exist where there is a special relationship to the one suffering the harm, or "where the actor's own affirmative act has created or exposed the other to a recognizable high degree of risk of harm through such misconduct, which a reasonable [person] would take into account."* RESTATEMENT (SECOND) OF TORTS § 302B cmt. e (1965) (emphasis added).

Kim, supra., 143 Wn.2d at 196, 15 P.3d 1283. Accordingly, pursuant to § 302 B and *Kim's* adoption of the rule described therein, a duty to guard against a third party's criminal conduct may exist where an actor's affirmative act has exposed another to a recognizable high degree risk of harm through such misconduct, which a reasonable person would take into account.

Thus, it is clear from *Parrilla, supra.,* that plaintiff's cause of action for negligence is sufficient to survive Defendants Millam' Motion for Summary Judgment Dismissal.

H. MR. MILLAM'S CLAIM OF A DEFUNCT MARRIAGE FAILS.

Mr. Millam sought dismissal from this action claiming his marriage was defunct. The issue was apparently not reached by the trial court, as it found Tara Millam's actions were not negligent.

In any event, Mr. Millam has not demonstrated by clear, cogent and convincing evidence that the presumption that property acquired during his marriage to Ms. Millam, specifically the 1992 Toyota Paseo, is community property. *In re the Marriage of Harrington*, 85 Wn.App. 613, 935 P.2d 1357 (1997).

The mere physical separation of spouses is not in itself sufficient to establish the marriage is defunct. 19 Wn.Practice § 6.2. There must be more than physical separation; there must be sufficient actions on the part of the spouses that they have renounced their marital relationship. 19 Wn. Practice § 6.2.

Factors to consider in deciding whether a marriage is defunct are: Commencement of matrimonial litigation (Id., 6.3); the giving of public notice (Id., 6.4); the existence of a contract, express or implied (Id., 6.5); Fault (Id., 6.6); and the "Ends of Justice" test (Id, 6.7).

It has been noted that the courts are less likely to find a defunct marriage if the rights of third parties are effected by such a finding. 19 Wn. Practice § 6.8.

There is no evidence presented by the Millams to establish that Mr. Millam was not managing community assets to benefit the community. Indeed, the family home remained a community asset on August 3, 2009.

RCW 26.16.140 has no effect on the status of property acquired prior to separation. Nor does it dissolve the marital community. It only applies to "earnings and accumulations" after a marriage has become defunct. *Kerr v. Cochran,* 65 Wn.2d 211 (1964).

Once again, the Millams are using self-serving declarations of themselves in an attempt to avoid liability to a third party. This type of "proof" cannot overcome the marital community presumption.

I. FORESEEABILITY/DUTY.

Under both theories of liability alleged by Mr. Faw, i.e., negligence or Negligent Entrustment under Restatement 305(b), the reasonableness of Ms. Millam's conduct is at issue. Ms. Millam clearly had a duty of care that was owed to other drivers on Washington highways. She had a duty not to entrust an incompetent, reckless or heedless individual with a vehicle that would be driven in Washington. Her behavior exposed Washington drivers to an unreasonable risk of harm; a reckless and heedless vehicle driver who was uninsured and whose privilege to drive was suspended. Ms. Millam's cancellation of insurance coverage is indicative of her lack of ordinary care. Yet, at the same time, her decision to maintain automobile insurance coverage on the vehicle for the 17 days from the time of the purported vehicle

transfer is further evidence that Ms. Millam owned the vehicle; otherwise she could not legally insure the vehicle for lack of an "insurable interest."

a. MR. PARKER WAS STATUTORILY INCOMPETENT FROM DRIVING THE VEHICLE IN WASHINGTON.

Mr. Parker was suspended from his privilege of driving in the State of Washington at the time of the accident. Ms. Millam knew that Mr. Parker was suspended in Washington when she allegedly gave the vehicle to Mr. Parker. She also had knowledge that Mr. Parker was recently incarcerated for a felony theft of a firearm and that he had a criminal record. She knew generally of his criminal records. Mr. Parker was twenty-one (21) years of age at the time of receiving the vehicle and at the time of the accident. He had spent what little time he had post minority primarily in custody pursuant to his incarcerations or living in a tent with his brother as a homeless person. He had no insurance for the vehicle. Entrusting a motor vehicle to a suspended driver can be negligence per se. *Hardwood v. Blublitz*, 254 Iowa 1253, 119 N.2d 886 (1963). See also *Aardvark v. Groova*, 89 SD.322, 322 NW.2d 842 (1975). It is statutory negligence to allow an unlicensed driver to drive. Both Washington and Oklahoma have compulsory insurance statutes. Mr. Parker could not transfer the vehicle title in Oklahoma without presenting proof of insurance. He had no insurance other than Ms. Millam's insurance. She did not cancel her insurance until seventeen days after the purported gift of the vehicle. By keeping the vehicle

insured after it was allegedly gifted to Parker, Ms. Millam's action raised the inference that the bill of sale was a sham; that the vehicle was not gifted to Mr. Parker; and that the bill of sale was merely intended to excuse Mr. Parker form a lack of a vehicle title or registration in the event he was stopped for a traffic violation as he drove back to Washington.

The entrustee's drivers history of reckless or careless driving is one basis for establishing his or her general incompetence to operate a motor vehicle pursuant to theory of Negligent Entrustment. 23 COA.2d 265, § 15 *Allan v. Toledo*, 109 Cal.App.3d 415, 167 Cal.Rptr. 270 (4th Dist. 1980). *Pleas v. Antone*, 68 Ill. App.3d 535, 24, Ill. Dec. 878, 386, NE.2d 82 (1st Dist. 1978). Other illustrations of the application of Negligent Entrustment theory can be found in Restatement (Second) of Tort § 390, comment B. That comment gives a specific example of potential liability related to the drivers incompetence by reason of recklessness; "'A" rents a motor vehicle to "B", a young man who announces his purpose to drive it to Boston to New York on a bet that he will do so in three (3) hours. "A" is subject to liability if the excess speed at which "B" drives the motor vehicle causes harm to travelers on the highway." Cases of negligent entrustment by reason of recklessness frequently turn on evidence of the entrustee's prior driving record, admissible to show incompetence known to the owner and entruster.

Had Tara Millam merely thought of or inquired as to Mr. Parker's prior criminal convictions, including one for joy riding in a stolen

vehicle, she would have been disturbed. She certainly had a duty to inquire about these issues. She also had a duty as to inquire why Mr. Parker was suspended from driving in the State of Washington. Finally, Ms. Millam clearly had a duty not to entrust the vehicle to Mr. Parker knowing that he was immediately take the vehicle to Washington while he was suspended from driving in the State of Washington and later that he was uninsured. This situation is similar to the example provided in Restatement (Second) of Tort § 390, comment (B) above.

V. CONCLUSION

The Defendants Millam have narrowly focused on the issue of contractual ownership between two parties to a purported agreement to donate a vehicle to Mr. Parker in an effort to absolve themselves from the issues of liability in the present case. But, ownership as between the two parties to a gift, or lack thereof, of the vehicle is not dispositive in this case because of the effect of the transfer on the third party, Mr. Faw. What is dispositive is the licensing statutes of both Oklahoma and Washington, which requires strict compliance with statutory vehicle transfer laws if a transfer occurs and the transferor desires to escape subsequent liability as an owner of the vehicle. Even if this court relies upon rebuttable presumption of ownership pursuant to a less strict interpretation of Washington or Oklahoma law, a jury issue remains, because the Certificate of Title provides a rebuttable presumption of ownership. There is another rebuttable

presumption that applies to this case. An owner of a vehicle is rebuttable presumed to be liable for injuries resulting from the driver's negligence. *Finney v. Fanes Ins. Co.*, 92 Wn.2d 748, 600 P.2d 1272 (1979).

Plaintiff's cause of action for negligence against the Millams under Restatement (Second) of Torts § 302(b) (1965) are not dependant upon ownership of the vehicle. Neither is the more specific tort of Negligent Entrustment. That is the case under both Washington and Oklahoma law. The trial court had no basis to dismiss these causes of action.

Mr. Faw request that this court reverse the Court's Order on Summary Judgement entered herein and remand this case for trial with instructions to not allow the purported bill of sale to be admitted into evidence in the trial court.

RESPECTFULLY SUBMITTED this 20th day of August, 2012.

LAW OFFICE OF DOUGLAS R. CLOUD

/s/ Douglas R. Cloud
DOUGLAS R. CLOUD, WSBA #13456
Attorney for Plaintiff

No. 42840-7-II

COURT OF APPEALS,
DIVISION TWO
OF THE STATE OF WASHINGTON

JOSHUA L. FAW,
a single person,

Appellant,

v.

KYLE S. PARKER, individually; and KYLE S. PARKER and "JANE DOE" PARKER, husband and wife, and the marital community composed thereof; and TARA MILLAM, individually; and TARA MILLAM and "JOHN DOE" MILLAM, wife and husband, and the marital community composed thereof,

Respondents.

CERTIFICATE OF SERVICE

Douglas R. Cloud (WSBA #13456)
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253-627-1505
Attorney for Appellant

CERTIFICATE OF SERVICE

The undersigned declares as follows:

I am over the age of 18 years, not a party to this action, and competent to be a witness herein.

I am an employee of Douglas R. Cloud, Attorney at Law.

On the 20th day of August, 2012, I mailed via United States regular mail, postage prepaid, the documents titled (1) Appellant's Opening Brief and (2) Certificate of Service to the following:

Washington State Court of Appeals (the original and one copy)
Division II
950 Broadway, Ste 300
Tacoma, WA 98402-4454

C. Joseph Sinnitt, Esq., WSBA #6284
SINNITT LAW FIRM
2120 North Pearl Street, Suite 302
Tacoma, WA 98406

Kyle S. Parker
7010 48th Ave E
Tacoma WA 98443-2313

The Appellant's Opening Brief was faxed to Mr. Sinnitt on this date.

I declare under penalty of perjury under the laws of the State of

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Washington that the foregoing is true and correct.

DATED this 20th day of August, 2012.

CARRIE L. MARSH